

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 23 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

|                          |   |                            |
|--------------------------|---|----------------------------|
| THE STATE OF ARIZONA,    | ) | 2 CA-CR 2010-0080-PR       |
|                          | ) | DEPARTMENT A               |
| Respondent,              | ) |                            |
|                          | ) | <u>MEMORANDUM DECISION</u> |
| v.                       | ) | Not for Publication        |
|                          | ) | Rule 111, Rules of         |
| GEORGE BENJAMIN MORANDO, | ) | the Supreme Court          |
|                          | ) |                            |
| Petitioner.              | ) |                            |
| _____                    | ) |                            |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061411

Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Law Office of Ronald Zack  
By Ronald Zack

Tucson  
Attorney for Petitioner

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E S P I N O S A, Presiding Judge.

¶1 Petitioner George Benjamin Morando was charged with first-degree murder and kidnapping. A jury acquitted him of these charges but found him guilty of the lesser-included offenses of second-degree murder and unlawful imprisonment. On appeal, this court affirmed the convictions and the aggravated, concurrent prison terms of twenty and 1.5 years, rejecting arguments the trial court had erred when it (1) made certain comments to the jury about having redacted portions of a video recording introduced as evidence, (2) instructed the jury not to consider any lesser-included offenses until it had either acquitted him of or failed to agree on a verdict for the greater offense, and (3) instructed the jury on reasonable doubt. *State v. Morando*, No. 2 CA-CR 2007-0160 (memorandum decision filed July 8, 2008). Morando filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., followed by a petition, in which he raised claims of ineffective assistance of trial and appellate counsel. The trial court denied relief without an evidentiary hearing, and this petition for review followed. Absent a clear abuse of discretion, we will not disturb the trial court’s ruling. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 In order to establish a colorable claim of ineffective assistance of counsel, a defendant must show counsel’s performance was deficient, based on prevailing professional norms, and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To demonstrate the requisite prejudice, the defendant must demonstrate there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694; *see also State v. Herrera*, 183 Ariz. 642, 647, 905 P.2d 1377, 1382 (App. 1995) (to establish claim of ineffective assistance of

appellate counsel, defendant must demonstrate counsel's performance was deficient and there is "reasonable probability . . . but for counsel's unprofessional errors, the outcome of the appeal would have been different"). A colorable claim entitling the defendant to an evidentiary hearing is one which, if taken as true, "might have changed the outcome." *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). Like the ultimate decision whether to grant or deny post-conviction relief, whether a claim is colorable, warranting an evidentiary hearing "is, to some extent, a discretionary decision for the trial court." *State v. D'Ambrosio*, 156 Ariz. 71, 73, 750 P.2d 14, 16 (1988).

¶3 Morando contended in his Rule 32 petition that the jury instructions did not clearly distinguish reckless second-degree murder from reckless manslaughter and did "not permit the jury to consider the degree of recklessness, although it was required to." Specifically, he asserted that, although the court defined "recklessly," it did not define the phrase "circumstances manifesting extreme indifference," or distinguish between that concept and "conduct showing a conscious disregard of the substantial and unjustifiable risk of death," or action that constitutes a "gross deviation" from reasonable behavior. "Yet, [he asserts] it is this very distinction upon which the degree of the culpability of recklessness is based." Morando claimed trial counsel had been ineffective because he had not challenged the instructions and that appellate counsel had been ineffective because she had not raised this issue on appeal.

¶4 Morando also argued there was insufficient evidence to support the elements of second-degree murder, particularly the element of extreme indifference to human life. He contends that trial counsel was ineffective for not challenging the

sufficiency of the evidence below in his motion for judgment of acquittal, Ariz. R. Crim. P. 20, or motion for new trial, and that appellate counsel was ineffective for not raising the issue on appeal. Additionally, he contended both trial and appellate counsel were ineffective for failing to challenge the court's order requiring him to pay \$400 in attorney fees without first finding Morando was able to pay that amount.

¶5 On review, Morando contends the trial court abused its discretion in denying relief, essentially reiterating the claims summarized above. But he has not sustained his burden of establishing the court abused its discretion. The court denied the petition in a thorough, well-reasoned minute entry order. The court identified the claims Morando had raised, articulated the correct standards for evaluating claims of ineffective assistance of trial and appellate counsel as well as other relevant principles of law, and resolved Morando's claims correctly and in a manner permitting this or any other court to review the basis for the trial court's ruling. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). The trial court resolved the claims correctly<sup>1</sup> and we adopt its order because no purpose would be served by rehashing the minute entry in its entirety here. *See id.*

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<sup>1</sup>The jury instructions were correct and support the trial court's dismissal of Morando's petition for post-conviction relief. The instructions adequately informed the jury of the distinction between "reckless second[-]degree murder and reckless manslaughter." *See* A.R.S. §§ 13-1103 (defining manslaughter); 13-1104 (defining second-degree murder). The jury was correctly instructed that both offenses can be committed if the defendant has acted recklessly, defined as being "aware of and consciously disregard[ing] a substantial and unjustifiable risk that the result will occur and that the circumstances exist." The jury was further instructed that a person is guilty of second-degree murder based on reckless conduct when the murder is committed "under circumstances manifesting extreme indifference to human life."

¶6 We grant Morando's petition for review but for the reasons stated herein,  
we deny relief.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge